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In the Supreme Court of the United States

OCTOBER TERM, 1958

SWIFT & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

NATIONAL BISCUIT COMPANY AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 612–44) is reported at 152 F. Supp. 738. The opinion of the United States Court of Appeals for the Fourth Circuit (Swift Pet. App. B, pp. 20–35; A. & P. Pet. App. B, pp. 24–39) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1958. The petitions for writs of certiorari were filed on August 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Under the Agricultural Act of 1949, the Secretary of Agriculture's power to support the prices of whole milk, butterfat, and their products is limited to making "loans on, or purchases of" such commodities. When, on March 9, 1954, the Secretary announced that the level of support would be reduced on April 1 from 90% to 75% of parity, he authorized Commodity Credit Corporation to accept combination offers of manufacturers and handlers to "sell" butter and cheese to Commodity at one price and "rebuy" them from Commodity at a lower price, resulting, in each case, in a direct payment by the Government to the offerers at the difference between the two prices.

The question is whether these transactions exceeded the Secretary's power under the statute to support prices by "purchases."

STATUTE INVOLVED

The pertinent provisions of the Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U. S. C. 1421, *et seq.*, are set forth in the Appendix, *infra*, pp. 19–20.

STATEMENT

1. THE STATUTORY BACKGROUND

For an understanding of the transactions involved, a brief statement of the statutory background is desirable.

Government price supports on agricultural commodities began prior to World War II. Various methods of price support as to different commodities have been authorized by Congress and employed by the Department of Agriculture under different statutes. Thus, under the Agricultural Adjustment Act of 1938 (52 Stat. 31, as amended, 7 U. S. C. 1281, *et seq.*), the Secretary of Agriculture was authorized "to make *payments* to producers * * * [of basic crops]" (7 U. S. C. 1303, emphasis added) and "to make available *loans* on agricultural commodities (including dairy products)" (7 U. S. C. 1302 (1946 ed.), emphasis added). The so-called Steagall Amendment to that statute (which was passed in 1941, 55 Stat. 498) broadened the authority of the Secretary by permitting the use of a "commodity loan, purchase, *or other operation*" if necessary to encourage production during the war emergency (15 U. S. C. 713a–8, emphasis added).

By a later war measure (Executive Order 9250, dated October 3, 1942, 7 Fed. Reg. 7871), the Secretary was authorized to hold the line on OPA ceiling prices, and at the same time uphold necessary farm production, through a program of purchases-and-resales-at-a-loss, whereby manufactured dairy products were bought at one price and immediately resold to the vendor at a lower price without any physical de-

livery (R. 615). The vendors were required to pass on the payments to the dairy farmers whom the program was designed to aid.[1] Toward the end of the war, however, Congress restricted and eventually abolished the authority of Commodity to make direct subsidy payments or to engage in "purchase-and-resale-at-a-loss" programs (*ibid.*).

After the war ended, price supports for dairy products were once again found to be needed. Extensive congressional debates led to the passage of the Agricultural Act of 1948 (62 Stat. 1247). Under Title I of that statute, price support for the calendar year 1949 could be furnished by "loans, purchases, or other operations," and under Title II, support after January 1, 1950, could be effected by "loans, purchases, payments, and other operations." These statutory provisions authorized the use after January 1, 1950, of two methods of supporting agricultural prices: (1) the "purchase" method, under which excess supplies which will not move into consumption at the support level are removed from the market by government purchases; and (2) the "payment" or "subsidy" method, under which the prices of agricultural commodities are allowed to reach their free competitive level, and prices to producers are supported by payments (either direct or through manufacturers and dealers) based on the differential between the average market prices and prices at the desired support levels (R. 615–617).

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[1] Price supports through direct purchases of whole milk and butterfat cannot be used because of the perishable nature of those commodities.

The 1948 statute was not allowed to remain in effect. Strong opposition to the payment method of support developed, notwithstanding the fact that it was strenuously advocated by then Secretary of Agriculture Brannan. This opposition resulted in the passage of the Agricultural Act of 1949 (App., *infra*, pp. 19–20). The omission of the payment method from this statute resulted from congressional insistence that supports be limited to government loans or purchases in the market (R. 616). Thus, although the Secretary was given a broad discretion as to the details of price support programs (7 U. S. C. 1421 (b), 1429), the 1949 Act specifically limited and prescribed the permissible methods and levels of such supports. The statute provides that prices of dairy products shall be supported at such levels between 90% and 75% of parity "as the Secretary determines necessary in order to assure an adequate supply," and that "Such price support shall be provided through *loans* on, or *purchases* of, the products of milk and butterfat" (7 U. S. C. 1446 (c), emphasis added).

The normal program, which has been uniformly followed since 1949 except for the special plan presently under consideration, may be summarized as follows (R. 619–25): the Secretary determines the parity level believed necessary to assure an adequate supply, translates the parity level into dollars-and-cents support prices for milk and butterfat, determines and announces the government purchase prices for the products of these commodities (computed on the basis of the support prices for the raw materials plus manufacturing costs), and stands ready to buy throughout the marketing year all products offered

to Commodity at the support level which the commercial market cannot absorb.

2. THE TRANSACTIONS INVOLVED

For the marketing year ending March 31, 1954,[1] manufactured dairy products were supported by government purchases at the maximum level of 90% of parity; for example, cheese was purchased at 37¢ per pound and offered for sale at 39¢ (R. 623). Huge surpluses in government warehouses resulted. Because of this, Secretary of Agriculture Benson concluded that an adequate supply would be assured for the coming year with support at the minimum level of 75% of parity. Accordingly, he announced such a reduction in February 1954; for example, cheese would be purchased at 32¼¢ per pound instead of the previous 37¢ (R. 625).

The announcement served to confirm existing fears of the industry, and it accelerated changes which were already occurring. Inventories were reduced by manufacturers and handlers, with increasingly large amounts being sold to Commodity to guard against inventory losses. A substantial amount of production was converted to large size cheddars, which were the only styles acceptable for government storage. The prices of milk and butterfat being paid to dairy farmers, which had begun to fall in December and January, continued to decline through the remainder of the marketing year (R. 624).

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[1] The marketing year for milk and butterfat is April 1-March 31.

The Department of Agriculture feared that the price of milk would continue to fall to undesirable levels. It also feared that certain concerns would sell to Commodity such large parts of their regular inventories that a disruption of normal market conditions would occur, even though this might injure the good will of those concerns.

Faced with these unusual circumstances, the Department modified its normal program in several ways. Although Commodity usually did not announce the price at which it would *sell* products to the market until the beginning of each month, Secretary Benson announced on March 4 that the April sales price would be 2¢ above the announced 1954–55 purchase price for cheese, and 3¢ for butter, so that after April 1 cheese could be purchased from Commodity at 34¼¢ per pound (R. 625). This decision was supplemented by the issuance of Announcement Da–112, providing (as amended) for three major changes:

(a) To permit offers to sell to Commodity to be made during the closing weeks of March prior to inspection and grading (R. 626–27). Since cheese cannot be graded until at least ten days after production, cheese made during the last ten days of March normally is valued on the basis of the support level of the next marketing year.[3] Relaxation of the normal requirement that cheese be inspected before offer was designed to enable manufacturers to take advantage of the higher March support price of 37¢ per

[3] See note 2, *supra*.

pound, and thereby continue to pay higher prices to dairy farmers during those weeks (R. 626).

(b) To include "small sizes" of cheese in the price-support program for the first time. The declared purpose of the change was to afford manufacturers of such products "the same degree of protection against financial loss on inventories" as Da-112 afforded to other manufacturers (R. 632-33).

(c) To establish, for the March 9-March 31 period, the program which is in issue in these cases (R. 627-32). Under Da-112, manufacturers were permitted, during the remainder of March, to submit combination offers to "sell" to CCC at the 1953-54 purchase prices (*e. g.*, 37¢ per pound for cheese) and "rebuy" the identical goods at the lower 1954-55 sales prices (*e. g.*, 34¼¢ for cheese) which would go into effect on April 1. All such offers had to be accepted before March 31st. The time of "delivery" and "transfer of title" to Commodity was to be the date of Commodity's acceptance of the offer if the goods had been inspected before the offer, or the date of inspection (which could be at any time up until April 30), whichever was later. The "resale" to the vendor was to take place on April 1 or on the date of "delivery" to Commodity, whichever was later. Therefore, as to that cheese which was inspected after April 1 (approximately 51% of the total, R. 595), "purchase" and "resale" took place at the identical instant of inspection. As to all of the products, the risk of loss was at all times on the offerer. No physical delivery was made. Storage and handling charges were for his account. If the purchase and selling prices an-

nounced to go into effect on April 1 had been increased as a result of bills then pending in Congress, the offerer could cancel the entire contract or be relieved of his obligation to rebuy. If the offerer sold the goods to another buyer, he incurred no liability to the Government for breach of contract. Commodity, on the other hand, did not have the right to dispose of the goods as it saw fit, but was committed to "resell" them to the offerer. Commodity did not pay for the products it "purchased," nor did the offerers pay for the products they "rebought;" the transaction was settled by one check from Commodity for the difference between the "sale" and the "repurchase" prices (for example, 2¾¢ a pound in the case of cheese).[4]

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[4] In March 1954, 96,045,582 pounds of cheese were sold outright to CCC. 85,531,425 pounds were "sold" and "repurchased" under Da–112 by 103 concerns which received $2,094,549. (R. 596–97). 65 of these concerns had never sold cheese to CCC since January 1, 1953 (R. 646). 80,424,645 pounds of butter were sold outright to CCC. 5,227,589 pounds were put under Da–112 by 45 concerns which received $282,783.20 (R. 597, 611).

National Biscuit Company and A&P were not manufacturers of cheese or butter, and bought no milk for such manufacture (R. 598, 604). The 3,406,979 pounds of cheese included by A&P in its Da–112 transactions had been set aside for curing (R. 601). It had bought some of it from CCC in December at 39¢ per pound (R. 600). Practically all the 4,523,722 pounds of cheese involved in National Biscuit Company's Da–112 transactions had been set aside for aging prior to use in making other products, and was worth more than 37¢ per pound (R. 604–06). All of Swift's Da–112 butter was sold to the trade in April 1954. Its Da–112 cheese was sold to the trade, or used in making processed cheese in April and May (R. 609). No part of the specific money received under Da–112 was paid to the producers from whom the milk was purchased (R. 596).

3. THE PROCEEDINGS BELOW

In response to a congressional inquiry, the Comptroller General in 1955 ruled that Announcement Da-112 was beyond the authority of the Secretary of Agriculture on the ground that the transactions were not "purchases" within the meaning of the Agricultural Act of 1949. He therefore determined that payments made to manufacturers and handlers pursuant to the program were improper (R. 654–58). Accordingly, after demands for restitution proved unavailing, suits were instituted by the United States in the spring of 1956 to recover these payments.

The District Court (Thomsen, Ch. J.), agreeing with the Comptroller General's ruling, entered judgments against petitioners in the total amount of $246,640.17 (R. 612–44). The court held that the program was not directed as much toward aiding the producers as guarding processors against inventory losses, although aiding the former was the only proper objective under the statute. As to whether the Da-112 program had any effect on the prices being paid to dairy farmers during the closing weeks of March, the court found that the effect was "debatable" and that the evidence of benefit to farmers was "nebulous" (R. 637–38). The court found that Da–112 affected only those marginal items which were not needed for normal use and which were not clearly surplus, but which were included under Da–112 for the very purpose of avoiding their being withdrawn from the market after April 1 (R. 642–43).

The court also held that the Da–112 transactions were not "purchases" within the meaning of the Act and hence were not authorized. With respect to pe-

titioners' contention that the term "purchases" includes any transactions which would accomplish a "removal" of supply from the market, the court found that there was no removal in any realistic sense since manufacturers and handlers were at all times free to make any disposition of their products which they chose without incurring any penalty whatsoever, except loss of the payments under Da–112 (R. 642).

The Court of Appeals, in an opinion by Circuit Judge Soper, unanimously affirmed the judgment of the District Court (Swift Pet. App. B, pp. 20–35; A. & P. Pet. App. B, pp. 24–39). The Court of Appeals found it unnecessary to look to the actual effect of the Da–112 transactions since, in the court's view, they were clearly not "purchases" within the meaning of the statute. The court characterized the "delivery" of and "transfer of title" to the products as "a paper transaction, which ended up with the Government owing the cheese manufacturer 2¾ cents a pound on all the cheese on which he had submitted claims; that instead of the Government buying the cheese from the manufacturer and the manufacturer then buying it back, what actually happened was that CCC sent the manufacturer a check for the 2¾ cents difference" (Swift Pet. App. B, p. 33; A. & P. Pet. App. B, p. 37).[5]

ARGUMENT

The question decided by the courts below—whether the transactions involved here were included within

[5] The Court of Appeals also affirmed the District Court's denial of interest prior to judgment. The Government will not apply for certiorari on this question, although it is believed that the court was in error.

the scope of the term "purchases" as used in the Agricultural Act of 1949—does not warrant review by this Court, for the issue is not one of general importance nor is there a conflict of decisions with respect to it.

Announcement Da-112 instituted a novel program, lasting less than 45 days, that differed in many respects from the normal program which has been universally followed under the 1949 Act and which has never been departed from before or since the Da-112 plan. As petitioners recognize (A. & P. Pet. 6), it was a response to a wholly unique situation, and, in our view, one which is not likely to recur.[6] There is no conflict of decisions. The decisions of both courts below are in accord, not only with the Comptroller General's decision (*supra*, p. 10), but also with the decisions of the two other district courts which have considered the question.[7] Moreover, the

[6] Although now maintaining that the issue is of wide significance, Swift pointed out in its brief below that Da-112 was designed "to deal with a temporary situation resulting from an unprecedented reduction in the price support level as of April 1, 1954" (Br. 2). The brief of National Biscuit Company and A. & P. described the problem as an "unprecedented situation" (Br. 6). Similarly, the National Milk Producers Federation, appearing as *amicus curiae* for reversal, stated that Da-112 was "temporary and emergency in nature, made necessary by the sharp drop in the support level from 90 to 75 percent of parity on March 31, 1954" (Br. 10).

[7] Similar judgments have been obtained against other processors in the District Courts for the Western District of Wisconsin and the District of Minnesota, Fourth Division. *Kraft Foods Co., et al.* v. *Commodity Credit Corp.*, Nos. 2820-2822, 2824, 2827, 2830, 2889; W. D. Wis., June 20, 1958; *Land O'Lakes Creameries, Inc.* v. *Commodity Credit Corp.*, No. 5521, D. Minn., July 3, 1958. These judgments have been appealed to the Courts of Appeals for the Seventh and Eighth Circuits, respectively.

decisions below are correct. And, if it were deemed desirable to authorize such transactions for the future, this can be accomplished by congressional adoption of an amendment to the statute as suggested by the Secretary of Agriculture (*infra*, pp. 16–17, n. 9).

1. Both courts below recognized that the transactions under Announcement Da–112 constituted, in fact, subsidy payments to processors of dairy products, rather than purchases in the market designed to maintain prices received by farmers at the desired support level. Accordingly, irrespective of the arguments advanced as economic justification for this plan, both courts properly enforced the legislative judgment, expressed in the Agricultural Act of 1949, that the support program must be carried out not by payments but solely by purchases and loans (7 U. S. C. 1446 (c), App., *infra*, p. 20).

In imposing this restriction on the methods the Secretary of Agriculture is permitted to employ, Congress made no exception or provision for temporary problems that might result from the Secretary's compliance with the statutory mandate to fix support at the level which he believed would assure an adequate supply. Announcement Da–112, as already noted, instituted a novel program in response to a wholly unique situation. But this was not the kind of situation which it can be assumed Congress could not contemplate. Since the support level announced at the beginning of the marketing year cannot be reduced during that year (7 U. S. C. 1426, App., *infra*, p. 19), year-end inventory losses are bound to occur whenever the support level is lowered, and yet Congress

made no provision for payments to owners of cheese and butter to protect against such losses. The absence of such a provision, and the unambiguous limitations placed upon the Secretary's power, establish the correctness of the decisions which petitioners seek to have reviewed.

Although the transactions found to be invalid were clothed in terms of "purchase" and "sale," it is apparent that they were "paper transactions" amounting to nothing more than payments to offset inventory losses. No physical delivery was made or intended. Storage and handling charges were all "for the account of the offerer." Although risk of loss normally accompanies transfer of title, in Da–112 transaction the risk of loss was retained by the manufacturers and handlers. The Government did not have the right to sell the products to other parties but was obligated to "resell" them at a loss to the vendors. On the other hand, the processors not only retained physical possession of the goods as part of their inventories but also full power to dispose of them in any manner they wished without incurring any liability to the Government. If the support level actually put into effect on April 1 were higher than that announced on March 4th, the processors could cancel their entire obligations. And Commodity Credit Corporation did not pay for the products which it purported to buy and the processors did not pay for the products which they purported to buy back; both transactions were settled by a single government check for the loss which Commodity agreed in advance to assume.

Furthermore, there can be no doubt that, under the normal program, the cheese covered by Da–112 transactions would not have been sold outright to CCC with the idea of buying it back after April 1. Much of it was worth more than 37¢ per pound because of its age or moisture content, and there was no guarantee under the normal program that the identical cheese could be repurchased. In addition, the substantial charges for repackaging required under the normal program (but not under Da–112) would have prevented many sales. And finally, since market prices of cheese after April 1st would be approximately 32¼¢ a pound, manufacturers and handlers presumably could get all of the cheese they needed, other than seasoned cheese, by purchases from the commercial market at that price without having to pay the higher 34¼¢ price to Commodity.

2. Contrary to petitioners' contention (Swift Pet. 8–9; A. & P. Pet. 15–17),[8] the legislative history (see

[8] Petitioners' reliance on *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, is misplaced. This case, unlike *Hearst*, concerns express statutory limitations on the authority and discretion of the Secretary in the administration of the statute. These limitations are expressed in unambiguous terms and should be given their normal meaning since such an interpretation does not lead to "absurd or futile results" or results "plainly at variance with the policy of the legislation as a whole * * *." *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543. See also *United States* v. *Wurts*, 303 U. S. 414, 417; *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253.

Similarly inapposite is *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U. S. 604. There is no parallel between the two cases. *Central Roig* involved the establishment of quota allotments under the Sugar Act of 1948, and this Court

pp. 3–6, *supra*) does not indicate that Congress intended to permit the use of payments to prevent inventory losses as long as they were made in the guise of a transfer of title for a consideration. Nor does the legislative history or language indicate that protection of processors against inventory losses by any other device was an objective of the price-support program; but yet that was the dominant purpose of Da–112. As found by the District Court (R. 638), these transactions were "not calculated to achieve the main objective of the price support program—the support of prices paid to farmers for their milk and butterfat."

Nor does the courts' interpretation conflict with prior administrative practice. As noted (*supra*, pp. 3–4), similar programs had been employed by the Secretary prior to the 1949 Act, but only under broader statutory grants of authority which, unlike the 1949 Act, permitted the use of "payments, and other operations." The Department of Agriculture has since stated to Congress that specific authority is needed to carry out programs of this type.[9]

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held that this was a matter committed to the discretion of the Secretary pursuant to legislative standards "of such breadth as inevitably to give the Secretary leeway for his expert judgment." 338 U. S. at 610. The present case concerns limitations expressly imposed by Congress on the methods available to the Secretary to carry out the statutory objectives. The determination of the extent and nature of these limitations is clearly a judicial function.

[9] In a report to the House Committee on Agriculture in January 1955 (H. Doc. No. 57, 84th Cong., 1st Sess.), the Department stated (p. 52):

"Another modification of the payment method would be the purchase-and-sale-at-a-loss or "wash sale" plan. For example,

Petitioners' stress that Da–112 was not a so-called "Brannan plan," under which the market price is allowed to reach a low competitive level and the difference between that and the support level is made up by income subsidies. But this amounts to a contention that any method of price support is permissible which Agriculture believes will tend to hold prices at support levels, at least if a transfer of legal title, however fictitious, is employed. This ignores the fact that the Secretary could have fulfilled his statutory obligation to maintain the support level throughout the marketing year simply by continuing to stand ready to purchase products at the announced figures, and that special efforts to insure an adequate supply, which is the only authorized statutory objective (7 U. S. C. 1446 (c)), were obviously not needed since the Secretary himself had determined that the supply was in great excess. It also ignores the fact, as found by the District Court (see p. 11, *supra*), that the Da–112 program did not effect a removal of supply from the market in any realistic sense. In rejecting petitioners' arguments, the courts below have simply given content to the congressional plan.

CCC might offer to buy from a processor all of the butter he produced at one price, and simultaneously sell it back to him at a lower price. Settlement actually would be made by paying the processor the difference between such prices, without taking delivery of the butter. Such a plan would have no advantage over simply making payments on production and would only make the program more complicated.

LEGISLATIVE AUTHORITY

"Additional legislation would be necessary to authorize payments to processors and dealers as a method of supporting prices to producers for milk and butterfat."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1958.

APPENDIX

The Agricultural Act of 1949, 63 Stat. 1051, as amended, 7 U. S. C. 1421, *et seq.*, provides in pertinent part:

7 U. S. C. 1421.

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.

(b) Except as otherwise provided in this Act, the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out, shall be determined or approved by the Secretary. * * *

* * * * *

7 U. S. C. 1426.

The Secretary shall, insofar as practicable, announce the level of price support * * * in advance of the beginning of the marketing year * * * but the level of price support so announced shall not exceed the estimated maximum level of price support specified in this Act, based upon the latest information and statistics available to the Secretary when such level of price support is announced; and the level of price support so announced shall not be reduced if the maximum level of price support when determined, is less than the level so announced.

* * * * *

7 U. S. C. 1429.

Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, That the scope and nature of such determinations shall not be inconsistent with the pro-

visions of the Commodity Credit Corporation Charter Act.

* * * * *

7 U. S. C. 1446.

The Secretary is authorized and directed to make available * * * price support to producers for * * * milk, butterfat, and the products of milk and butterfat as follows:

* * * * *

(c) The price of whole milk, butterfat, and the products of such commodities, respectively, shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply. Such price support shall be provided through loans on, or purchases of, the products of milk and butterfat.

7 U. S. C. 1447.

The Secretary is authorized to make available through loans, purchases, or other operations price support to producers for any nonbasic agricultural commodity not designated in section 1446 of this title at a level not in excess of 90 per centum of the parity price for the commodity.

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